

# COMMONWEALTH OF VIRGINIA

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## VIRGINIA HOUSING COMMISSION

### SUMMARY

#### **Common Interest Communities Work Group October 15, 2014, 10:00 AM House Room C, General Assembly Building**

#### **I. Call to Order - Common Interest Communities Work Group**

**Delegate David Bulova**, *Chair*, called the meeting to order at 10:00 AM.

**Work Group members in attendance:** Delegate David Bulova, *Chair*; Delegate John A. Cosgrove; Delegate Barry Knight; Janice Burgess, *Virginia Housing Development Authority*; Heather Gillespie, *Common Interest Communities Ombudsman*; Trisha Henshaw, *Common Interest Communities Board*; Mike Inman, *Community Association Institute*; Ronald P. Kirby, *Virginia Association of Community Managers*; Michael Toalson, *Home Builders Association of Virginia*; Pia Trigiani, *Common Interest Communities Board*; and Jerry Wright, *Community Associations Institute*.

**Staff:** Elizabeth Palen, *Executive Director of VHC*

#### **II. Non Judicial Foreclosures**

- **Paul S. “Chip” Bliley, Jr**, *Partner, Williams Mullen*: Judicial Foreclosure. In Virginia, a deed of trust, when signed, the homeowner is placing legal title of the property to trustees, who are given power to sell the property if there is a default, or if the notices are given, etc. Often the foreclosure deals with the first deed of trust; first position, and other that real estate taxes from the foreclosure, any other lien are wiped out.
  - Issue with the Condominium Association and Homeowners Association (HOA) is that there is a non judicial foreclosure process to enforce that lien in the statute, which is similar to that in the deed of trust foreclosure. The statute says you can sell the property subject to prior deeds of trust.
  - The problem is that a 2003 Supreme Court case. The HOA brought a non judicial foreclosure and the bank enjoined the sale, on the basis that they did not believe they would receive the proceeds from the foreclosure sale.
  - The Supreme Court ruled that even though the statute said that it could be sold subject to the deed of trust that the commissioner of the foreclosure first had to pay off the first deed of trust. There was a strong dissent in that case, believing that “subject to” meant leaving the first deed in place, but majority ruled that It had to be sold free and clear of the first deed of trust.

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DELEGATE DANIEL W. MARSHALL, III  
DELEGATE DAVID L. BULOVA  
DELEGATE ROSALYN R. DANCE  
DELEGATE BARRY D. KNIGHT  
DELEGATE CHRISTOPHER K. PEACE

SENATOR MAMIE E. LOCKE  
SENATOR JOHN C. WATKINS  
SENATOR GEORGE L. BARKER

MARK K. FLYNN  
LAURA D. LAFAYETTE  
T.K. SOMANATH

- I agree with the dissent, and believe the ruling renders the non-judicial foreclosure method impractical.
- **Delegate Barry Knight:** Would you voluntarily ask for a deed in lieu of foreclosure?
  - **Bliley:** In that case the owner would give the property back to the bank. The problem may be that the people in financial distress could also have other subordinate liens against them, and the foreclosure sale wipes out all the other liens. The deed in lieu of foreclosure does not.
- **Michael Toalson, Home Builders Association of Virginia:** One issue is that people can be in the arrears with their HOA, and the threat was they could take your home. What is your experience with this? Is that common?
  - **Bliley:** I really do not know. I deal primarily with banks.
  - **Pia Trigiani, Common Interest Communities Board:** In the seven years at our firm, we have never taken one all the way to foreclosure. It is rare that we pursue foreclosure.
- How do we get the lenders to assist in getting people to pay their assessments? The lenders tell borrowers must pay their taxes, insurance and assessments. Payment of taxes and of insurance is enforced. They do not enforce the ability of the association to collect the assessment.
  - **Bliley: One solution is to** Change the priority between the condo and the deed of trust, like taxes, and then they would have to escrow it.
- But why wouldn't the lenders follow their documents?
  - **Bliley:** They would be in default for not paying their condo fees. If they wanted to foreclose, they could foreclose. The question is if foreclosure is wise.
  - **Trigiani:** Those are the same considerations the association would have to consider.
- **Toalson:** I have had some success with notifying lenders that are about to foreclose under the statute we are discussing; and the lender offers the money for the assessment because they do not want to see a foreclosure.
  - Regarding the Supreme Court ruling, reasoning of the majority was to honor subsection a of that section of the code: "the lien once perfected shall be prior to all other liens except... and sums unpaid on any first mortgages." Thus, this was interpreted that the first deed of trust must be paid off.
  - In regards to Del. Knight's comment, a deed in Lieu would not work for an association, as they do not want the deed.
- **Bliley:** In DC, the six-month condo liens have priority over the deed of trust. In a recent case, the court ruled that if the condo association moved to enforce that six-month they could wipe out the deed of trust. That is a situation that they give priority.

- **Trigiani:** The Uniform Condominium Act contains a limited priority lien, the last six months of assessment prior to the foreclosure prime the first trust. With the case Mr. Bliley describes there is concern that it extinguishes the first trust lien. There have been attempts to make the priority scheme in the Condominium Act and the Property Owners Association Act the same by the legislature. The recommendation of the Commission on Uniform State Laws is that there be a limited priority lien. It encourages the lender to be attentive to the assessments.
- **Bulova:** Even though non-judicial foreclosures are rare, what is the proper amount of oversight, what do other states have in terms of oversight or whether it's automatic? Regarding getting lenders to assist in assessments, we discussed something the Uniform Law Commission had put together. Are there other legal mechanisms that could accomplish the same thing?
  - **Bliley:** The Statute as it reads is pretty comprehensive notice requirement, more comprehensive in a condo situation than with a deed of trust. You get a sixty-day notice, which is plenty of time to go to court if it needs to be. To enforce assessments, I cannot think of any other way to do it than through the Uniform Law Commission.
- If assessments were assessed, then lenders would collect that six-months of funds. Condo and HOA fees can be significant, and while there might be some circumstances where it may be beneficial to put the bank in as a collector for an HOA. You're putting the bank out there as the one collecting, retaining the fees and making the decision whether they should be paid. I believe that would add to the burden of homeownership. Those fees are the number one impediment to homeownership.
- **Bliley:** Foreclosure taskforce studies foreclosure for two years, and in the end decided to change nothing. The problem with foreclosures had nothing to do with the foreclosure process, but with loss mitigation and modification and other lender's problems.
- The foreclosure process for assessment liens is modeled after the deed of trust foreclosure. The associations are subject to the same rules and procedures of the game as lenders are subject to.
  - **Bliley:** It's more complicated than that; there are more safeguards built into it.
- **Knight:** If the non-judicial foreclosure route is rarely used, but is raising fears; what would be the effect of eliminating the non-judicial foreclosure route?
  - **Bliley:** I think elimination of the non-judicial foreclosure, and using the judicial process would also eliminate any fear.
- **Trigiani:** I think that is exactly correct. Our recommendation is to go with the judicial process because we think it is safer and creates clearer title at the end of the process. However, we would like the six-month priority, but that is extremely unlikely. I would like to see the Property Owners Association lien have the same priority as the Condominium Association lien, and to clear up this Colchester issue, which I think is bad law.

- **Flynn:** Have there been attempts to rewrite the Colchester decision?
  - **Bliley:** The only case law I could find was an Attorney General citing it as good law.
- **Flynn:** Have there been any legislative proposals that got anywhere?
  - **Trigiani:** I've not heard of a case against it, but the dissent is very strong.
- **Toalson:** I would favor keeping the non-judicial foreclosure statute because it gives the associations another tool, and is far less expensive than the predator suit. Boards do not go recklessly foreclosing on people under this statute. This is a tool that is underutilized because there is a fear of spending on all of the costs without getting a result.
- I agree that this is about the money. It is difficult Association with little money to take the risk and go forward with this or even challenge the Colchester.
- **Bulova:** While non-judicial foreclosures are rare, there is no particular interest in eliminating this as an option.

### III. CIC Bill of Rights (HB 332; Greason, 2014)

- **Trisha Henshaw, Executive Director, Common Interest Communities Board:** During the Common Interest Communities legislative update this March, the board established the Ombudsman committee to discuss several issues: (1)unregistered common interest community associations, (2) associations lacking complaint procedures to resolve complaints from members to citizens, (3) registration issues from associations with defunct/dysfunctional boards, and (4) recommendations regarding HB 332.
  - The Committee will focus on education and outreach initiatives to alleviate these issues, and use the “bill of rights” proposed in HB 332 as part of the foundation for educational resources to be developed. The Committee will meet in December to develop an implementation plan.
- **Toalson:** Did you discuss webinars as a possible educational tool?
  - **Henshaw:** The Committee did specifically discussed webinars, and was hopeful to collaborate with other groups to help make that available.
- **Bulova:** How were you planning to distribute this information?
  - **Henshaw:** We are still discussion that topic. Internet based outreach and print information outreach are both possibilities that will be discussed in our December meeting.
- **Bulova:** What are the most commonly misunderstood topics that should be addressed with this educational initiative?
  - **Henshaw:** The number one complaint regards transparency. The law outlines clear requirements for open meetings, and there is a fear in volunteer leaders of boards in having open discussion.
- **Barker:** Yes, I've experiences that. Boards call executive session to exclude others from discussion.

#### IV. Discussion on HOA Survey Results

- **Bulova:** Regarding the HOA survey, the HOAs being established in Virginia are not considered too small. Interestingly, when asked if the issue should be discussed before the Housing Commission or left to the local government, the survey results were split evenly.
  - As discussed previously, the alternatives for small HOAs are either VDOT, with respect to roads, or the locality, regarding storm water management. Is this an issue for local governments or are there alternatives to consider regarding HOAs that are too small?
- **Toalson:** Many local governments are MS4 localities, where a permit is given from the EPA that authorizes discharge storm water. As these permits are reissued, more strict requirements are given. I think you will see fewer HOAs taking responsibility for the storm water in the future. Given the new level of oversight from the EPA, the responsibility will fall to the local government.
- **Knight:** In Virginia Beach, an HOA installed these packaging systems, as there was no central sewer system, and then allowed these package systems to deteriorate. The city eventually had to take responsibility for them. Localities that want new developments and growth that cannot put in these package systems will have to team up with the city.
- This is a big debate among many of our counties. They haven't come to us for any changes at the General Assembly level. It's still a local issue, but one that still needs to be addressed.
- **Bulova:** Are there things we can and should do at the General Assembly level? Or is this a problem that needs to be dealt with within the current confines of their authority.
  - A few localities have discussed it but haven't come up with a specific recommendation yet.
- **Barker:** Many HOAs got these systems when the costs were lower. With new regulations, the financial burden is astronomical. I have four extremely large HOAs, and they still find the costs burdensome. I can only imagine how smaller HOAs deal with the expenditures.
- **Toalson:** Localities are putting in efforts to survey where these storm water facilities are, how big they are, are they working, etc.
- **Bulova:** If enabling authority is needed for a new solution, we will rely on the VACOS and VMLs to provide solutions. This is an issue for the localities for the long term.
- **Knight:** Farmers won't have documentation on their storm water management. Its non-point source, and is not all the localities fault. I think we need to let EPA we've done a good work with storm water management for many years.
- **Bulova:** The survey results show that some HOAs are not too large to be governed by the existing provisions of the Code of Virginia. The major concern was that old

covenants that were poorly done create bad HOAs, There is no method, practically, to fix this issue. The larger the HOA gets, the harder it is to change faulty documents.

- **Barker:** I have four huge associations in my district, and they manage themselves very well.

**V. Public Comment**

- **Delegate Bulova** asked for any public comment.

**VI. Adjourn**

- Upon hearing no request to comment, **Delegate Bulova** adjourned the meeting at 11:00 AM.